B.C.D. 05-39

AUG 0 5 2005

EMPLOYEE SERVICE DETERMINATION
Claims for Retroactive Employee Service Credit

This is the decision of the Railroad Retirement Board with regard to whether KN and BB should be credited with railroad service for the periods 1975 through 1984 and 1973 through 1984, respectively, with the DeQueen and Eastern Railroad (DQE), based on their employment with Weyerhaeuser Company, an affiliate of DQE.

KN and BB claim that they should be credited with railroad service for the periods 1975 through 1984 and 1973 through 1984, respectively, with DQE. However, retroactive credit for service is limited to four years pursuant to section 9 of the Railroad Retirement Act which requires railroad employers to file annual reports of compensation and service with the Railroad Retirement Board. Section 9 provides that the Board's records of reported compensation and service become final unless the error in a report of compensation or the failure to report compensation is called to the attention of the Board within four years after the date on which the report of compensation was required to be made. Section 209.8 of the Board's regulations (20 CFR 209.8) requires that on or before the last day of February, each railroad employer must report the compensation and service of the employer's employees for the previous calendar year. Section 211.16 of the Board's regulations (20 CFR 211.16) provides that as a general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud. A majority of the Board finds no evidence of fraud in the record in connection with the failure to report the service of KN and BB. Accordingly, a majority of the Board declines to credit service and compensation for them for the period in question.

In Board Coverage Decision 05-17, issued May 4, 2005, the Board concluded that GS, DSR, and CH have been performing service subject to the continuing authority of DQE to supervise and direct the manner of rendition of their service and that, consequently, their service and compensation may be credited to the extent permitted by section 9 of the Railroad Retirement Act and section 211.16 of the Board's regulations. GS, CH, and DSR all claimed to have been working in covered employment since the 1970s. In that decision, the Board stated that the instant decision, concerning BB and KN, would address the issue of retroactivity of credit for GS, CH, and DSR. Accordingly, for the reasons

stated above, a majority of the Board declines to credit service and compensation for these individuals for the periods in question.

Michael S. Schwartz

V. M. Speakman, Jr.
(Dissenting, Separate dissenting Opinion attached)

Jerome F. Kever

DISSENTING OPINION OF
V. M. SPEAKMAN, JR.
Claims for Retroactive Employee Service Credit

For the reasons stated in my dissent in BCD 05-21, (Employee Service Determination on Reconsideration of L.P.), I must also dissent in this case. It is clear from that decision, from BCD 05-17 (Employee Service Determination of G.S. et. al.), and now from this case, that the DeQueen and Eastern Railway (DQE) and its parent corporation, Weyerhaeuser Company, had a policy of carrying employees of DQE on - Weyerhaeuser's payroll. Whether this was done intentionally to avoid railroad retirement costs, or was simply an innocent mistake, is not clear since Weyerhaeuser/DQE has never been required to answer the affected employees' allegations. If the employees can establish that Weyerhaeuser/DQE willfully failed to file reports of compensation under the Railroad Retirement Act, they can receive credit for service under that Act, beyond the 4-year limitation set forth in the Majority's decision.

In 2003, BB and KN protested their BA-6's (Certificates of Service and Compensation) and alleged that service from 1973 to 1983 with the DQE was still not reflected after their repeated attempts to get their employer, the DQE, to make the necessary corrections. Their protest was denied and was dismissed by a hearings officer without a hearing.

With respect to BB, in his submission to the Bureau of Hearings and Appeals (BHA), he indicated that in 1973 he accepted a position as "a car accountant" for Weyerhaeuser's wholly owned subsidiary, DQE. He was initially put on railroad retirement but after 2 days on the job was told that HR was "doing me a favor" and that he was to be removed from the railroad payroll and put back on the payroll of Weyerhaeuser while remaining an employee of DQE. This situation continued until 1984 when he was moved to DeQueen, Arkansas, and placed on DQE's payroll and thus under railroad retirement.

With respect to KN, the allegations are similar. In the information she submitted to BHA, she indicated that commencing February 1975 she was hired by Weyerhaeuser to do cost accounting for the DQE. However, she was carried on the Weyerhaeuser payroll until 1984 when, like BB, she was transferred to the DQE payroll. She, like BB, alleges that at that time she requested that Weyerhaeuser correct her employment records to reflect railroad retirement coverage from 1975. Weyerhaeuser and DQE have more or less put her off.

These allegations in and of themselves do not establish fraud under Section 211.16 (b)(1) of our regulations, but they do beg for some explanation from Weyerhaeuser/DQE as to why they switched these individuals to railroad retirement in 1984 when they allegedly had been doing the same job since 1973.

As I stated in my dissent in BCD 05-21, an examiner should be appointed under part 258 of our regulations to make recommended findings in these appeals. Such an examiner would have subpoena power and the ability to take testimony from the employees, Weyerhaeuser and DQE and weigh the credibility of the witnesses. The power to take testimony and cross-examine witnesses would lead to a more complete record upon which the Board could make a determination.

The closest precedent we can look to is In re Chandler, Appeal Docket No. C1-AP-0025, decided July 27, 2001, in which the Board, Management Member dissenting, held that under the facts presented, inaction by the employee in protesting his Certificate of Service and Compensation, did not necessarily bar correcting his record of compensation beyond the 4-year period, if fraud under Section 211.16(b)(1) is shown. In that case, the Board reached its decision based upon a record developed by a hearings officer.

Just as Chandler, these employees should also be given an opportunity to make their case before a hearings officer.

V. M. Speakman, Jr.

V. M. SPEAKMAN, JR.